CHUA MOH HUAT, DENNIS

v.

HARVESTER BAPTIST CHURCH LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
CHAN SEK KEONG J
CHAO HICK TIN J
[CIVIL APPEAL NO. 19 OF 1989]
7 NOVEMBER 1991

LAND LAW: *Conveyancing - Sale and purchase - State of property at time of handing over - Habitability on vacant possession - Condition - Warranty - Forfeiture of deposit - Termination - Rescission - Date for determination of damages - General principles.*

An agreement dated 29 May 1984 was entered into between the respondents as purchasers and the appellant as vendor for the sale and purchase of a property.

The said property was to be completed and delivered to the appellant by 30 September 1984 if approvals were obtained by them and if not, by 30 November 1984.

Disputes however arose between the parties wherein it was maintained by the respondents that there was a breach of contract on the part of the appellant in failing to hand over the property in the state and condition it was on the date of signing of the agreement.

The appellant then formally terminated the said agreement and forfeited the respondents' deposit.

The respondents commenced action against the appellant wherein the Court held that the respondents had effectively rescinded the agreement and therefore ordered the appellant to refund monies paid under the agreement. The Court also declared a charge on the property for the amount to be refunded and dismissed the appellant's counterclaim for damages for breach of contract on the part of the respondents. This is the appellant's appeal.

Held:

[1] Although the respondents had made known to the appellant their need to acquire a habitable house when they signed the agreement, there was no evidence that the appellant had assented in any way to the needs of the respondents. Therefore, the learned Judge had erred in law in imposing an obligation on the appellant to deliver the property for habitation on completion.

[2] Neither the respondents nor the appellant had asked for a joint inspection of the property before signing the agreement.

[3] The construction afforded by the learned Judge to Clause 6 of the agreement was also wrong. Clause 6 serves the same function as an "as in where is" clause in the agreement for the sale of goods. Clause 6 expressly excluded any warranty or condition as to the state and condition of the property, and also, in consequence, its fitness for habitation.

[4] Following *Davron's* case, it was the respondents and not the appellant, who were in breach of contract in failing to complete the purchase of the property. The appellant has therefore succeeded in his counterclaim for damages.

[5] Damages for breach of contract should be given to a party to compensate him for his loss. In this case, the damages should be assessed as at the date of the breach, that is, either 28 December 1984, when the 21 day notice expired or 15 January 1985, when the appellant treated the contract as at an end.

[6] Logically, the correct date should be 28 December 1984 as on the day after, the appellant was in a position to deal with the property as he liked.

[7] The value of the property to be accepted is the respondents' own valuer's figure of $710,000 as at 27 December 1984. Therefore the damages which the appellant is entitled to is the difference between $915,000 and $710,000 which is $205,000, from which must be deducted the sum of $191,500 received by the appellant under the agreement. The net sum amounts to $14,000.

[8] However as the property was sold by the mortgagees pending the appeal, and the surplus of $108,284.82 was paid to the respondents on 13 September 1989 under an order of Court dated 25 August 1989, the appellant was entitled to a refund of this sum with interest at 8% p.a. from 13 September 1989 to date of refund.

[Appeal allowed.]

Cases referred to:
Miller v. Cannon Hill Estates Ltd. [1931] 2 KB 113 ***(foll)***
Hoskins v. Woodham [1983] 1 All ER 692 ***(cit)***
Davron Estates Ltd. v. Turnshire Ltd. [1982] CAT 37 ***(foll)***
CA Prosper Homes v. Hambros Bank E & T Co. Ltd. [1979] P & CR 305 ***(foll)***
Royal Bristol Permanent Building Society v. Bomash [1887] 35 Ch D 390 ***(foll)***
York Glass Co. Ltd. v. Jubb [1926] 134 LT 36 ***(foll)***
Johnson v. Agnew [1979] 1 All ER 883 ***(cit)***
Mayson v. Clouet [1924] AC 980 ***(foll)***
Holland v. Wilshire [1954] 90 CLR 409 ***(foll)***
10 Radford v. De Froberville [1978] 1 All ER 33 ***(foll)***
Radford v. De Froberville [1978] 1 All 33 ***(foll)***

Legislation referred to:
Sale of Goods Act 1893 [UK], s. 51

Other sources referred to:
Barnsley's Law of Conveyancing & Practice 1988, 3rd Edn., at p. 230
Storey on Conveyancing 1983 Edn., at p. 69

For the appellant - Giam Chin Toon with Wee Egk Chong; M/s. Wee Swee Teow & Co.
For the respondents - Robin Lim with Amy Cheah; M/s. Lee Ang Wu & Wong

JUDGMENT

Chan Sek Keong J:

This is an appeal by the appellant against the decision of Chua J:

(1) declaring that the respondents had effectively rescinded an agreement dated 29 May 1984 (the agreement) entered into between the respondents as purchasers and the appellant as vendor for the sale and purchase of the property known as No. 3 Bartley Road, Singapore (the property);

(2) ordering the appellant to refund to the respondents, with interest, the total sum of $191,500, being money paid under the agreement;

(3) declaring a charge on the property for the amount to be refunded; and

(4) dismissing the appellant's counterclaim for damages for breach of contract on the part of the respondents.

The dispute between the parties arose in the following circumstances. The respondents are an incorporated church. They owned the premises, which they used as a church, adjacent to the property. In 1984, the respondents were looking for residential premises to house foreign missionaries who were coming to Singapore with their families. They decided to buy the property which was then vacant. They approached the appellant who was the owner. The appellant had originally intended to sell the property for development into a pair of semi-detached houses. He accordingly stipulated a price to reflect its development potential. The respondents wanted the property as it was. After some negotiations, the parties agreed to the price of $915,000 and signed the agreement.

The material terms of the agreement provided, *inter alia*, as follows:

> Clause 1 - price of $915,000 subject to The Singapore Law Society's Conditions of Sale 1981 (the 1981 conditions) insofar as they are not inconsistent with the special conditions therein;
>
> Clause 2 - $91,500 being 10% deposit to be paid on signing of the agreement;
>
> Clause 3 - $100,000 to be paid by the purchaser within one week thereof;
>
> Clause 5 - vacant possession to be given on completion;
>
> Clause 6 - property sold in present state and condition;
>
> Clause 13 - sale subject to purchasers obtaining governmental approval;
>
> Clause 14 - completion on 30 September 1984 if approvals obtained by then, and if not extended to 30 November 1984, the purchaser to pay interest on late completion on $723,500 at 11% per annum from 1 October 1984 to 30 November 1984.

In late June 1984, the respondents requested immediate possession of the property from the appellant but he denied the request as he needed the property to accommodate some foreign workers. The respondents obtained the last governmental approval on 26 October 1984. On 21 November 1984 the appellant's solicitors sent their completion account to the respondents' solicitors for completion on 30 November 1984 which included an item of $10,000 for interest (as reduced from $13,905). On 22 November 1984, the respondents requested a waiver of the interest on the ground that the appellant had been paid 20% and that the respondents were a charitable organisation. On 23 November 1984, the respondents' solicitors notified the mortgagees' solicitors for the release on 30 November 1984 of the proceeds of the mortgage loan of $600,000 to complete the purchase. On 28 November 1984, the respondents' solicitors telexed the mortgagees' solicitors and requested a cashier's order for the entire loan in favour of the appellant's bankers. Up to that time, the respondents were ready and willing to complete the transaction.

On 29 November 1984, the appellant rejected the respondents' request for waiver of interest. On the same day, the appellant's solicitor received the following letter from the respondents' solicitors:

> *re: 3 Bartley Road, Singapore*
>
> Our clients are ready to complete but on a visit to the premises yesterday, they found the place in a mess with contractors' materials and junk stored in the premises as well as workers walking in and out.
>
> As the property is sold with vacant possession, please request your client to immediately vacate and restore the premises to the condition they were in when our clients inspected the premises 6 months ago at the time of purchase, otherwise our clients will hold your client liable for any delay in completion.

Please telephone us for completion when your client has vacated and restored the premises to its original condition.

On 3 December 1984, the appellant's solicitors replied as follows:

We thank you for your letter of 29 *ultimo* and telex of 30 *ultimo*.

We are instructed by our client that the premises has been completely cleaned up and ready for handing over.

Reference to your clients' request for a meeting with our client, we are instructed by our client that as there are no outstanding matters in connection with the sale, our client sees no necessity for your clients to arrange a meeting for any discussion.

The respondents' solicitors telexed the following reply on the same day:

We refer to your telex of today and also the writer's teleconversation with your Mrs. Hui this morning whereby we informed you of the deplorable conditions of the premises.

The photos taken by our clients clearly show that your client has abused the premises. We understand this was due to the 20 foreign workers whom your client has housed therein. The roofing tile is broken/missing in several places. This has resulted in severe damage of the beams and ceiling throughout the whole premises. The toilet and plumbing are in disrepair. The doors and windows are broken. The overall filth and decay further revealed the disregard of your client or his servants for the proper care of the said premises. These conditions were entirely different from the conditions our clients saw at the time of the contract.

Our clients are holding your client in breach of the contract and in accordance with the terms of the contract, our clients hereby give you notice that the agreement shall be rescinded and become null and void and of no further effect whatsoever. Accordingly, we are instructed to and hereby demand the refund of $91,500 plus another $100,000 paid to your client, making a total of $191,500, forthwith.

We would also like to inform you that our clients' ABN Bank have already deposited the sum of $600,000 with their solicitors, Messrs Drew & Napier as from 29 November 1984 and the interest rate payable is 9.75% p.a. Your client will have to bear the loss sustained by our clients over the payment of interest by reason of your client's breach and inability to complete and hand over the premises to our clients in the condition which our clients have contracted to buy.

Our clients reserve their right to sue your client for other damages arising from your client's breach of contract.

Without prejudice to our clients' right herein, your Mrs. Hui has agreed with our Mr. Lim to be at the site to see for yourselves the conditions of the premises on 4 December 1984 at 9.30 a.m. Our clients will be there and we suggest your client be also present at the site.

We wish to emphasise that the site visit tomorrow shall be entirely without prejudice to our clients' claim against your client for breach of contract.

On 4 December 1984, the respondents' solicitors sent another telex to the appellant's solicitors as follows:

We refer to our joint inspection (Mrs Hui/Mr Joshua Lim) of the above premises this morning (4 December 1984) in the presence of our respective clients.

Your Mrs. Hui has seen the deplorable conditions of the premises. The 29 coloured photographs taken by our clients on 30 November 1984 (shown to your Mrs Hui at the site this morning) confirmed the deplorable conditions of the premises as described in our telex of 3 December 1984 to you.

Our clients did inspect the premises immediately before the signing of the contract on 29 May 1984. At that time, the premises were vacant + in good + tenantable repair + condition. Subsequent to the signing of the contract, our clients approached your client for permission to move into the premises pending completion as our clients had by then paid your client more than 20% of the purchase price which is more than the usual 10%. Our clients' request was turned down. Soon after your client brought in 20+ foreign workers to live in the premises. It is apparent that your client and/or the workers had abused the use of the premises.

As your client has failed to hand over the above premises in good + tenantable repair + condition to our clients on 30 November 1984 (the date fixed for completion), your client is in breach of the agreement, for which breach our clients are entitled to repudiate the contract. We have, accordingly on 3 December 1984, given you such notice of repudiation + demanded the refund of the money paid. We reiterate again our clients' demand for the refund of the money plus interest at 11.5% from the two dates of payments.

Our clients also reserve their rights to claim other damages + losses sustained as a result of your client's breach. As soon as we have assessed the quantum, we will write to you.

In the meantime, should your client fail to refund the sum as demanded forthwith, kindly confirm that you have instructions to accept legal process on your client's behalf.

On 7 December 1984, the appellant's solicitors gave the appellant's side of the story in the following telex sent to the respondents' solicitors:

We refer to your two telexes dated 3 and 4 December 1984. Our client says that neither he nor his foreign workers have abused the property as alleged. The particulars of the alleged damage to the property and the causes thereof mentioned in your telex dated 3 December 1984 are also denied.

Our client purchased the property in late March 1984 for the purpose of demolishing and rebuilding thereon a pair of semi-detached house for which our client had submitted plans to BDC for approval, a fact known to your clients at the material time. The previous owner had let the property for use to an automotive workshop cum store. When our client took possession of the property on completion, the property internally and externally was substantially in the same condition as it is today apart from some cleaning up which our client undertook after complaint. When our client's foreign workers moved into the premises to reside, our client did further work to restore it to a habitable condition.

On our instructions, this sale and purchase came about directly as a result of your clients' approach to our client to sell the same. There was no joint inspection before the contract, and it goes without saying that your clients must have inspected the property before they approached our client as aforesaid. Your clients were therefore able to accept Clause 6 of the contract which provides that 'the property is sold in its present state and condition. The purchaser shall be deemed to be satisfied with the same.'

At the same time when our respective clients negotiated the sale and purchase of the property, your clients had specifically requested for a reduction in the sale price as your clients had indicated to our client that your clients would have to incur expenses in renovating the property to make the same more habitable for your clients', Rev. Tay and some foreign students. The 'disrepair', if any, of the premises was therefore well known to your clients at that time. Before completion, your clients had requested our client for the keys to the property to enable your clients to commence the renovation works on the property.

Your clients must have therefore be deemed to have inspected the property before the sale and purchase agreement dated 29 May 1984 was entered into. Your clients had ample opportunities before the contract to examine the property and it is our instruction that the condition then was the same as it is today and there has been no change in the condition from what it was before the contract was signed.

As your clients' church is immediately behind the subject property, your clients would surely be aware of the general condition of the subject property before and after your clients signed the said sale and purchase agreement and your clients have previously not complained of any damage to the property.

On our instructions, your clients are not entitled to repudiate the contract and our client will regard any purported repudiation as unlawful.

By your letter dated 29 November 1984, you indicated to us that your clients were ready to complete, but on a visit to the property, your clients found the place in a mess with contractor's materials and junk stored in the premises as well as workers walking in and out. No mention however was made of any damage to the property which your clients have now alleged. Your letter made the point that your clients would hold ours liable for any delay in completion, and this must mean that on 29 November 1984, your clients were still intending to complete.

Our client suspects that with the falling of property prices in Singapore presently and our client's refusal to waive completely the interest at your clients' request, your clients are now finding an excuse to repudiate the contract.

Our client has all along been and is now ready, able and willing to complete the sale and Kertas Penamaan:

(A) Denies that he is in breach of contract and says that based on your clients' allegations, your clients are not entitled to repudiate the contract.

(B) Denies your clients' claim for damages and interest.

(C) Shall treat your clients' action as an unlawful repudiation of contract.

On behalf of our client, we hereby give your clients twenty one (21) days' notice from the date hereof to complete the sale and purchase herein failing which our client shall take such action as may be advised.

We have our client's instructions to accept service of legal process on behalf of our client. In the event your clients institute proceedings, our client will counterclaim.

On 7 December 1984, the appellant's solicitors gave a 21-day notice to the respondents to complete the purchase under condition 29 of The Singapore Law Society's Conditions of Sale 1981. The respondents, through their solicitors, continued to maintain that there was a breach of contract on the part of the appellant in failing to hand over the property on completion in the state and condition it was at the date of the signing of the agreement. On 8 December 1984, the respondents commenced this action. The statement of claim was filed on the same day.

On 15 January 1985, the appellant's solicitors notified the respondents' solicitors of the formal termination of the agreement and the forfeiture of the respondents' deposits of $91,500 and $100,000.

On 19 January 1985, the appellant filed his defence. On 24 January 1986, the respondents filed their amended statement of claim and on the same day the appellant filed his amended defence.

The respondents' cause of action as pleaded in the amended statement of claim is as follows:

Para. 3 - that the property was in good and tenantable repair and condition on 29 May 1984.

Para. 6 - that on 28 November 1984, the plaintiffs found the property in a deplorable, completely untenantable and severely deteriorated state of repair and condition as compared to its state and condition as at 29 May 1984, particulars of which were provided.

Para. 7 - that on 29 November 1984, the plaintiffs demanded that the property be restored to the same condition as at 24 May 1984;

Para. 8(a) - that the defendant refused, failed or neglected to so restore the property to the condition as stated in Clause 6 of the agreement, and by his action and conduct, had rendered himself capable of delivering vacant possession of the property to the plaintiffs as required of the defendant under Clause 5 of the agreement;

Para. 8(b) - that in breach of Clause 5 of the agreement, the defendant had failed to deliver vacant possession of the property to the plaintiffs on 30 November 1984 and by his failure to do so, evinced an intention that he would no longer be bound by the agreement.

As pleaded above, the respondents' cause of action is founded upon the appellant's inability to deliver vacant possession of the property on 30 November 1984 arising from their refusal, failure or neglect to restore the property to the same condition as it was on 24 May 1984. In pleading the cause of action in that way, the solicitors for the respondents have confused vacant possession with habitability. The two concepts are not the same. An owner may be able to deliver vacant possession of a house which is not fit for habitation. Conversely, an owner may be able to deliver a house fit for habitation without vacant possession.

However, at the trial, the respondents appeared to have abandoned their claim based on the appellant's alleged failure to deliver vacant possession of the property and proceeded on the appellant's alleged failure to deliver the property in a state fit for habitation. They called 14 witnesses to testify on their behalf. The appellant called 9 witnesses (including himself). The disputes of fact related to the state and condition of the property at various times, the intention of the respondents in purchasing the property, the intention of the appellant in agreeing to sell the property at the agreed price, etc.

Chua J found as follows:

... the plaintiffs' main purpose in purchasing the premises was for the immediate occupation by their missionary staff otherwise they would not have agreed to pay such a high price for the premises. The defendant was told and knew of this. I also find that the house at the time of the agreement was entered into was in good habitable condition fit for immediate occupation. After the fourteen foreign workers had moved in the middle of June 1984 and had occupied the premises for several months, the house had been damaged to a deplorable state that it was not fit for human habitation.

The Judge also found that "... the plaintiffs rescinded the agreement when the defendant refused to restore the house to the same condition it was at the date of the agreement as that clearly showed that the defendant no longer intended to be bound by that agreement".

At the trial, Counsel for the appellant had submitted that the law was as stated by Swift J in *Miller v. Cannon Hill Estates Ltd.* [1931] 2 KB 113, as follows, at p. 120:

I think it is quite clear law that if one buys an unfurnished house, there is no implication of law, and there is no implied contract that the house is necessarily fit for human habitation. That must be good sense, because a man who buys an empty house may not necessarily need it as a dwelling house; he may be buying something which is almost in a state of ruin, knowing that he will have to restore it and pay a considerable amount of money for restoring it. He may buy a house which wants a new roof put on or which has other obvious defects of which he knows, and may have defects of which he does not know, and if he wants to buy a house which is fit for habitation, then he must expressly stipulate that the house shall be fit for habitation. He can always get an express warranty that an unfurnished house is fit for habitation, if he is prepared to pay the price which attaches to an unfurnished house which

has such a warranty, rather than the price which a vendor is willing to take for an unfurnished house without such a warranty. The position is quite different when you contract with a builder or with the owners of a building estate in the course of development that they shall build a house for you or that you shall buy a house which is then in the course of erection by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come into as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling.

Chua J, after quoting the said passage, concluded as follows:

Here we have a case where the plaintiffs had agreed in May 1984 to purchase a dwelling house fit for human habitation and ready for occupation. The defendant was well aware of the purpose for which the plaintiffs required the house and that it was for immediate occupation. Clause 6 of the agreement provided that "the property is sold in its present state and condition" which means that the house was habitable and ready for immediate occupation. The plaintiffs had asked for early occupation soon after the agreement was signed and again in July 1984 after the foreign workers had moved in. Six months later, when the time for completion came along, the house was found to be in a deplorable state and unfit for human habitation. The house was not what the plaintiffs had contracted to buy. The defendant was obliged to restore the house to its original habitable condition. The refusal of the defendant to do so evinced an intention on the part of the defendant not to perform his part of the agreement and the plaintiffs were entitled to treat the defendant's conduct as a breach going to the root of the matter and to treat themselves as discharged from further performance.

Before us, Counsel for the appellant has contended that Chua J's decision was wrong in the following respects:

(1) in finding as a fact that the house was in a habitable condition when the agreement was signed;

(2) in holding that there was an implied or express term in the agreement that the appellant would deliver the property in a state fit for habitation at the date of completion; and

(3) in finding that there was a fundamental breach of this term by the appellant.

With regard to the first ground, Counsel contended Chua J's finding was wrong in that he:

(i) accepted the testimony of the respondent's witnesses, all of whom were interested witnesses, and one of whom had admitted, after he had given evidence, to making corrections to certain minutes of board meetings of the respondents' relating to the purchase of the property, and the other of whom had earlier agreed to give evidence on behalf of the appellant provided he was paid for doing so;

(ii) rejected the testimony of the appellant's independent witnesses as to the state and condition of the property at the material dates. The appellant's case was that there was no change in the state and condition of the property between the date of the agreement and the date fixed for completion.

With regard to the second ground, Counsel contended that Chua J's reasoning was wrong, whether on the basis of an express term or implied term. He contended that Clause 6 of the agreement meant that the respondents were estopped from raising questions on the state of the premises. It followed that the finding that there was a breach by the appellant which went to the root of the contract was also wrong.

We agree with Counsel for the appellant on his submissions on the law. The general principles applicable to the purchase of landed properties are as follows:

1. The maxim *caveat emptor* applies to the purchase of a completed house: there is no warranty that it is fit for habitation: see *Miller v. Cannon Hill Estates Ltd. and Hoskins v. Woodham* [1938] 1 All ER 692; however, there is an implied warranty as to fitness for habitation in the case of a house under construction, because as Swift J has said, that is the very nature and essence of the transaction;

2. As to physical defects, the vendor is under no duty to disclose any defects in, and makes no warranty about the state and condition of the property being sold. The purchaser must satisfy himself on these matters: see *Storey on Conveyancing* 1983 Edn., at p. 69.

3. After an agreement for sale is signed, the vendor has a correlative duty to preserve the property in a reasonable state of preservation and as it was when the contract was made. He is therefore liable to the purchaser for wilful damage or neglect: see authorities cited in *Barnsley's Law of Conveyancing & Practice* 1988, 3rd Edn., at p. 230;

4. A breach by the vendor of his duty to preserve the property does not entitle the purchaser to decline to proceed or even to delay the completion; he is only entitled to damages or an abatement of the purchase price: *Davron Estates Ltd. v. Turnshire Ltd.* [1982] CAT 37, *CA Prosper Homes v. Hambros Bank E & T Co. Ltd.* [1979] P & CR 305, and *Royal Bristol Permanent Building Society v. Bomash* [1887] 35 Ch D 390.

The reasons why the law has established the principle that a vendor in selling a completed house does not warrant that it is fit for habitation have been mentioned by Swift J in *Miller v. Cannon Hill Estates Ltd*. The principle is applied not as a rule of presumption which can be rebutted in any particular case by the purchaser making the vendor aware of his purpose in purchasing such a house. As Swift J has pointed out, if a purchaser wants to buy a house which is fit for habitation, he must expressly stipulate for it. He can stipulate for a warranty or a condition, and be prepared to pay the price for such a warranty or a condition. A vendor who gives such a warranty or condition takes upon himself an additional burden of making good his obligation at the time of completion. If he breaches a warranty, he is liable for damages. A breach of warranty by the vendor does not entitle the purchaser to rescind. If he breaches a condition, the purchaser is entitled to rescind the contract and claim damages for breach.

In this case, Chua J found that the respondents had made known to the appellant their need to acquire a habitable house when they signed the agreement. However, he made no finding that the appellant had assented in any way to the needs of the respondents. There is no evidence that the appellant had assented. In our view, Chua J has erred in law in imposing an obligation on the appellant to deliver the property fit for habitation on completion. We should further observe that neither the respondents nor the appellant had asked for a joint inspection of the property before signing the agreement.

Chua J also appeared to have construed Clause 6 of the agreement as an express term, operating as a condition and not as a warranty, that the house would be fit for habitation on completion. He construed it to mean "that the house was habitable and ready for occupation". Clause 6 read as follows:

> The property is sold in its present state and condition. The purchaser shall be deemed to be satisfied with the same.

In our view, that construction is also wrong. Clause 6 served the same function as an "as is where is" clause in an agreement for the sale of goods, the purpose of which is to exclude any of the warranties as to merchantability, etc. implied under legislation relating to the sale of goods. Accordingly, Clause 6 expressly excluded any warranty or condition as to the state and condition of property, and also, in consequence, its fitness for habitation.

In *Davron's* case, the agreement for sale contained a clause similar to Clause 6 of the agreement. That clause read:

> the purchaser shall be deemed to buy with full notice in all respects of the actual state and condition of the property, and save where it is to be constructed or converted by the vendor, shall take the property as it is.

The Court of Appeal held that the purchaser was entitled to compensation for damage to the house caused by the ripping up of the floorboards by squatters, but not entitled to delay completion for 9 days. Accordingly, the purchaser had to pay interest for late completion.

For the above reasons, we are of the view the respondents and not the appellant were in breach of contract in failing to complete the purchase of the property. It is therefore not necessary for us and we do not propose to consider the submissions of Counsel for the appellant on the findings of fact by Chua J.

It follows from the above conclusion that the appellant has succeeded in his counterclaim for damages. We now assess the damages payable by the respondents to the appellant.

At the trial, both parties called expert evidence on the market value of the property as at 4 dates:

(i) 29 May 1984, the date of the agreement,

(ii) 30 November 1984, the date of the respondents' first breach,

(iii) 27 December 1984, the day before the respondents' second breach, and

(iv) 29 June 1987, the date the parties have agreed as the date of the trial. Tabulated below are the respective valuations:

Dates	Respondents' Valuation	Appellant's Valuation
29 May 1984	$780,000	$870,000
30 November 1984	$680,000	-
27 December 1984	-	$710,000
29 June 1987	$450,000-$500,000	$530,000

Counsel for the appellant has contended that the date for determination of damages should be the date of the trial or judgment (which, for this purpose, both Counsel have agreed as 29 June 1987). Counsel cited a number of authorities to show that the English Courts have applied different dates in assessing damages for breach of contract for the sale of land. Having considered these authorities, we only need to examine two of them. In *York Glass Co. Ltd. v. Jubb* [1926] 134 LT 36, the vendors, who were in receivership, had agreed to sell a glass factory to the purchaser who had agreed to buy it as a going concern. The purchaser repudiated the contract, as a result of which the receivers had to sell the same factory on a

"break up" basis. The difference between the two values was considerable, amounting to £21,000 in proportion to the contract price of £54,600. Nevertheless, the Court held that damages were to be assessed as the difference, if any, between the price agreed to be paid and the value of the land at the date of the breach. The Court rejected an argument that the first element for comparison should be "the true value of the property at the time the contract was made". The Court of Appeal applied the old common law rule as to damages, which is:

> Where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed (per Sir E Pollock MR, at p. 40).

In *Johnson v. Agnew* [1979] 1 All ER 883, a more recent and higher authority, the vendors agreed to sell the premises to the purchaser at the price of £117,000 free from encumbrances. The contract date was 1 November 1973. There were 3 charges on the property but the purchase consideration was more than sufficient to pay them off. The completion date was 6 December 1973, before which date the purchaser had accepted the vendors' title. The purchaser failed to complete on 6 December 1973, and on 21 December 1973, the vendors' solicitors served a 21 day notice, time to be of the essence fixing 21 January 1974 as the date for completion. On 8 March 1974, the vendors issued a writ claiming, *inter alia*, specific performance and damages. On 20 May, 1974, the vendors applied for summary judgment, and on 27 June 1974 an order for specific performance in the usual form was made. The order was not drawn up and entered until 26 November 1974.

Meanwhile the mortgagees took action. They obtained an order for possession of part of the property and sold it on 3 April 1975. Completion took place on 18 July 1975. The vendors took action on the order for specific performance on 5 November 1975 when they issued a notice of motion seeking, *inter alia*, a declaration that they were entitled to treat the contract as repudiated by the purchaser and to forfeit the deposit and an inquiry as to damages. The Court of Appeal held that the claim for damages was barred at common law, but also held that the vendors were entitled to damages in equity under the Chancery Amendment Act 1858 (Lord Cairns' Act). The Court ordered, *inter alia*, an enquiry of damages, such damages to be assessed by reference to the difference between £117,000 and the value of the property as at 26 November 1974 (the date of entry of the order for specific performance) but not to exceed the difference between the purchase price and the aggregate sum of £3000 (being the portion of the deposit paid by the purchaser) and the proceeds of the sales by the mortgagees of the several parts of the property to the extent to which such proceeds discharged indebtedness of the vendors.

On appeal, the House of Lords (Lord Wilberforce delivering the only judgment), held that the vendors were entitled to damages at common law, that damages at common law were assessable on the same basis as in equity. All authorities to the contrary were overruled. As to the date of assessment, their Lordships held that the common law rule on assessment was not absolute, that in the circumstances, the proper date should be 3 April 1975 and not 26 November 1974, as 3 April 1975 was that date when the vendors were disabled by the mortgagees' sale from enforcing the order for specific performance. The relevant passages in Lord Wilberforce's judgment on this point are found at p. 896, as follows:

> The general principle for the assessment of damages is compensatory, that is that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach, a principle recognised and embodied in s. 51 of the Sale of Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to injustice, the Court has power to fix such other date as may be appropriate in the circumstances.

> In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie them to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost. Support for this approach is to be found in the cases. In *Ogle v. Ear Vane* the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market; in *Hickman v. Haynes* at a reasonable time after the last request of the defendants (the buyers) to withhold delivery. In *Radford v. de Froberville*, where the defendant had covenanted to build a wall, damages were held measurable as at the date of the hearing rather than at the date of the defendant's breach, unless the plaintiff ought reasonably to have mitigated the breach at an earlier date.
>
> In the present case, if it is accepted, as I would accept, that the vendors acted reasonably in pursuing the remedy of specific performance, the date on which that remedy became aborted (not by the vendors' fault) should logically be fixed as the date on which damages should be assessed. Choice of this date would be in accordance both with common law principle, as indicated in the authorities I have mentioned, and with the wording of the Act in substitution for ... specific performance'. The date that emerges from this is 3 April 1975, the first date on which the mortgagees contracted to sell a portion of the property.

Counsel relied on the above passages and also on the cases decided under Lord Cairns' Act where it had been decided that damages were to be assessed at the date the action was brought. And because Lord Wilberforce had stated that damages for breach were to be assessed on the same basis in equity as at common law, Counsel relied on the equity cases to contend that damages should be assessed at the date of the action in this case. He also suggested that the older authorities had given damages at the date of breach because there was relative financial stability in the past and that the lapse of time did not affect the assessment, that times have changed and that if today damages were to be fixed as at the date of breach, injustice would be caused to the innocent party.

We do not accept Counsel's submission on the law or his economic explanation for what he considered as the old law. The basic principle as re-stated by Lord Wilberforce is beyond argument. It is that damages for breach are given to the other party to compensate him for his loss. This principle is constant. Where the contract is one of sale, this principle "**normally** leads to assessment of damages as at the date of breach": (per Lord Wilberforce *ibid*). We emphasise the word "normally". But it is not an absolute rule, and if to follow it would cause an injustice, the Court has power to fix another date as not to cause injustice. So stated, the injustice referred to is the injustice to the innocent party as he is the party entitled to be compensated for any loss he may have suffered.

In the *York Glass* case, it was just that the purchaser was made to pay damages to the vendors, even though they were considerable, because that would put the vendors in the position as if the contract had been performed. In *Johnson v. Agnew*, neither the Court of Appeal nor the House of Lords fixed the date of assessment as at 21 January 1974, the date of the purchaser's first breach, because the vendors had kept the contract alive in suing for specific performance. The purchaser was put in a position to perform up to the time when the order of specific performance could have been enforced. But before that could be done, the vendors were themselves rendered unable to perform by the action of their mortgagees in selling the property. In that situation, the question arose as to the proper date for assessment of damages. As 21 January 1974 was no longer relevant, the choice of dates was limited to the following:

(a) 27 June 1974, the date when the order for specific performance was given, or

(b) 26 November 1974, the date when the order was drawn up or entered, or

(c) 3 April 1975, when the vendors lost their contract by the mortgagees' sale.

The Court of Appeal chose 26 November 1974 as the relevant date but the House of Lords decided that 3 April 1975 was the proper date in the circumstances, as on that date the vendors, having acted reasonably in claiming specific performance, were deprived of their remedy through no fault of theirs. Up to 3 April 1975, it was still open to the purchaser to perform but she did not. Accordingly, the choice of 3 April 1975 was well within the basic principle of compensation, as 3 April 1975 was the last date on which the contract could have been performed.

In the present case, the respondents failed to complete the purchase on completion date and on 4 December 1984 purported to "rescind" it. They were in a great hurry to get out of the contract, as the telexes showed that they had not given the appellant an opportunity to put the property into a habitable condition (assuming that what they had alleged was true). The appellant could have accepted the respondents' repudiation immediately but he did not. He elected, which he was entitled to do, to keep the contract alive in accordance with Condition 29 of the 1981 Conditions by giving a 21-day notice to the respondents to complete, time to be of the essence. The respondents again failed to complete on the extended date, 28 December 1984, and on 15 January 1985 the appellant accepted the repudiation of the respondents by terminating the contract and forfeiting the two sums of $91,500 and $100,000 without prejudice to his rights under the law.

Although it is not relevant to our decision, we should observe that the second payment of $100,000 was not subject to forfeiture as it was not a deposit but a payment towards the purchase price: see *Mayson v. Clouet* [1924] AC 980, PC. We should add further that although the appellant acted under Condition 29 of the 1981 Conditions, he did not follow through with it by selling the property within the period allowed by that condition and claiming any deficiency in the price as liquidated damages. When he first filed his defence on 19 January 1985, he claimed only the unpaid interest. However, on 24 January 1986, he amended his counterclaim to include a claim for damages for breach of contract. He elected to sue at common law for unliquidated damages rather than to forfeit the 10% and claim liquidated damages, if any, arising from a re-sale of the property: see *Holland v. Wilshire* [1954] 90 CLR 409.

On the basis of the principle stated in *Johnson v. Agnew*, the appellant must satisfy the Court that there were circumstances here which make the application of the normal rule of assessment unjust to him. Counsel has not identified any such circumstance. His explanation for the rationale of the normal rule for assessment of damages is fallacious. The date of the trial is not relevant in this case because the appellant has not sued for specific performance. It would appear that Counsel has opted for the date of the trial as the relevant date for assessment for no better reason than that it would produce the highest amount of damages for his client.

In this case, the appellant could have mitigated his loss by re-selling the property immediately. His evidence was that although he had contacted estate agents and advertised the property for sale, he was unable to sell the property at the price he wanted. He wanted a price which was sufficient to pay off the mortgage (which was an additional $791,500, even after taking into account the $191,500 which he has received much earlier) but could not get it. His own inability to discharge the mortgage cannot be a circumstance which caused him injustice. For this reason, the decision of *Radford v. De Froberville* [1978] 1 All ER 33 does not assist him as in that case Oliver J held that the Court must also consider whether the claimant ought reasonably to have mitigated the breach at an earlier date. Moreover, his evidence on his attempts to sell was far from satisfactory. His attempted sale through brokers was a bare assertion. All his 3 advertisements in the Straits Times, on 28 April 1985, 9 May 1985 and 29

June 1985, were misleading. The first described the property as "two units, uncompleted, 3 storey semi-link bungalow, area 440 sq m each". The description was wrong as he had not commenced building operations and the land area was wrong. The second and third advertisements were similar except that the areas were omitted. The appellant had apparently attempted to sell the property in a state and condition different from that which he sold to the respondents.

Accordingly, we hold that in this case damages should be assessed as at the date of the breach. The date was either 28 December 1984, when the 21 day notice expired or 15 January 1985 when the appellant treated the contract as at an end. Logically, the correct date should be 28 December 1984 as on the day after the appellant was in a position to deal with the property as he liked: see Warrington LJ in the *York Glass* case at p. 43. We have evidence before us that at the date of breach the property market was in a rather steep declining phase. The respondents' own valuer has valued the property at $710,000 as at 27 December 1984. In the circumstances, we accept that figure as the market value of the property as at the date of breach by the respondents. Therefore the damages the appellant is entitled to is the difference between $915,000 and $710,000 = $205,000 from which must be deducted the sum of $191,500 received by the appellant under the agreement. The net sum is $14,000.

Pending this appeal, the appellant's bankers sold the property as mortgagees and the surplus of $108,284.82 was paid to the respondents on 13 September 1989 under an order of Court dated 25 August 1989. The appellant is entitled to a refund of this sum with interest at 8% p.a. from 13 September 1989 to date of refund. In addition, the appellant is entitled to be paid the following:

(1) the sum of $13,905 being accrued interest on the balance of the purchase price up to 30 November 1984;

(2) further interest on $13,905 at the same rate from 1 December 1984 to 28 December 1984;

(3) interest on $14,000 from the date of the writ up to the date of judgment at the rates chargeable by the appellant's bankers up to the date they agreed to sell the property;

(4) incidental costs relating to the abortive sale amounting to $2,521.62, and

(5) solicitor and clients' costs to be taxed in connection with the appellant's application to discharge himself from bankruptcy.

The appellant's appeal is allowed. The decision of Chua J is set aside and there will be judgment for the appellant on his counterclaim, both with costs here and below, in terms of the preceding paragraph. There will be an enquiry on item (3) hereof unless the parties otherwise agree.

Also found at [1992] 1 CLJ 229